NATSEVEN TV SDN BHD

v.

TELEVISION NEW ZEALAND LTD

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[SUIT NO: MT3-22-86-2001]
14 SEPTEMBER 2001

CIVIL PROCEDURE: *Injunction - Interim injunction, application for - Injunction to restrain winding-up proceedings in winding-up court pending determination of present action - Proper forum to hear application - Test required to succeed - Undertaking as to damages - Balance of convenience - Non-disclosure of material facts*

CIVIL PROCEDURE: *Injunction - Interim injunction, application for - Test required - Whether a prima facie case or serious issue to be tried*

CIVIL PROCEDURE: *Injunction - Interim injunction, application for - Injunction to restrain winding-up proceedings in winding-up court pending determination of present action - Dispute as to sum due and payable - Whether dispute should be resolved in winding-up court - Whether due sum could be challenged in view of default judgment*

The defendant provided consultancy service to the plaintiff to commence and run a television broadcasting station. When the plaintiff failed to pay a certain sum in respect of the service thereof, the defendant obtained a default judgment against the plaintiff. The plaintiff failed to satisfy the judgment sum and the defendant commenced winding-up proceedings against the plaintiff. This was the plaintiff's application for an interim injunction to restrain the defendant's winding-up petition in the winding-up court pending the determination of the plaintiff's action herein.

Held:

[1] The first and foremost issue was whether the plaintiff might obtain an interim injunction from one High Court to restrain a winding-up petition already pending in another High Court. That avenue exists under s. 221(1) of the Companies Act 1965 for the plaintiff to apply for a stay of the winding-up petition as the court may adjourn the hearing of the winding-up petition conditionally or unconditionally or make any interim or other order that it thinks fit. Since the plaintiff did not seek to invoke s. 221(1) to stay the winding-up petition, the court would not consider it but proceed to consider its application for injunctive relief. (p 729 a-b & c-d)

[2] The court agreed with the reasoning expounded in *Perpetual Plantations of Australia Ltd v. United Tree Farmers Ltd*: (1) that the dispute as to whether the sum was due and payable should be best resolved in the winding-up court; (2) that the company might seek an injunction in the winding-up court instead of commencing separate proceedings to restrain winding-up proceedings; and (3) that to allow an interim injunction in a court, other than the winding-up court to restrain winding-up proceedings, would be to encourage litigants to commence a multiplicity of proceedings where the same were not necessary. It followed therefore that the plaintiff's application constituted an abuse of process of the court. The plaintiff was not without any effective remedy as the plaintiff was at liberty at all times to apply to the winding-up court to stay the winding-up petition. (pp 729 d-g & 730 c)

[3] The plaintiff could not by way of the present proceedings challenge the validity of the due sum in view of the default judgment. The plaintiff was bound by the default judgment which was a valid and regular judgment unless and until it was set aside. The application to set aside should be made to the court in which the default judgment was entered. All the views relating thereto must be ventilated there and not in this court by way of a separate and distinct proceeding. Since the plaintiff was bound by the default judgment, the defendant was entitled to proceed with the winding-up petition based on the default judgment. (p 730 d-f)

[4] Since the plaintiff's claim for damages were purely monetary in nature, there was nothing to be preserved by the grant of an interim injunction. (p 730 g)

[5] The test required of the plaintiff to succeed in this application for injunctive relief was to establish a *prima facie* case and not merely a serious question to be tried. The plaintiff's admissions of indebtedness which had not been contemporaneously withdrawn had amply demonstrated that the plaintiff was not likely to establish any *prima facie* case against the defendant and that there could be no *bona fide* dispute on the due sum. Further, the plaintiff was estopped from denying its own admissions of indebtedness. The plea of mistake could not succeed as there was only a bare assertion to establish it. (pp 731 d & 734 c-f)

[6] Based on the affidavits, the plaintiff's undertaking as to damages was doubtful. A judge hearing an application for injunction was entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail and in appropriate cases, may require the plaintiff to secure his undertaking. Hence, where the plaintiff is incapable of executing the undertaking as to damages at the material time, injunction should not be granted. (pp 735 f & 736 a-c)

[7] The balance of convenience or justice was not in favour of granting the injunction, as there was no evidence of any irreparable harm suffered by the plaintiff whose business activities including television broadcasting continued and would continue as usual. There was no evidence of any apparent prejudice or damage occasioned to the plaintiff. In any event, as the defendant was a company owned by the New Zealand government, the defendant was in a position to pay damages, if any, to the plaintiff. (p 736 d)

[8] The plaintiff's affidavit in support of the application for injunction did not disclose certain material facts which it was obliged to disclose as it was seeking an equitable remedy. The plaintiff's conduct must be equitable as he who seeks equity must come with clean hands. The plaintiff's conduct in relation to the non-disclosure of the material facts had adversely affected the plaintiff's application for injunctive relief. (p 736 e-g)

[Application dismissed.]

Case(s) referred to:

American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***

Anglian Sales Ltd v. South Pacific Manufacturing Co Ltd [1984] 2 NZLR 249 ***(refd)***

Associated Tractors Sdn Bhd v. Chan Boon Heng & Anor [1990] 2 CLJ 157 ***(refd)***

Bank Pembangunan (M) Bhd v. Elgi Marka Sdn Bhd [1998] 5 MLJ 504 ***(refd)***

Bina Satu Sdn Bhd v. Tan Construction (Sued as a firm) [1988] 2 CLJ 652; [1988] 1 CLJ (Rep) 384 ***(dist)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(refd)***

Bryanston Finance Ltd v. De Vries (No 2) [1976] 1 All ER 25 ***(refd)***

Bukit Melita Sdn Bhd v. Lam Geok Hee & Ors [1997] 4 AMR 3160 ***(refd)***

Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors [1989] 1 MLJ 426 ***(refd)***

Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 ***(refd)***

Gale v. Superdrug Stores Plc [1996] 1 WLR 1089 ***(refd)***

Gerak Indera Sdn Bhd lwn. Farlim Properties Sdn Bhd; Goh Keat Poh (Wasi dan Pemegang Amanah Harta Pusaka Chor Sin Khen, si mati) & Lain-lain lwn. Farlim Properties Sdn Bhd [1997] 3 MLJ 90 ***(refd)***

Hasham v. Zenab [1960] 2 WLR 374 ***(refd)***

Hixgold Pty Ltd v. FCT [1992] 8 ACSR 607 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 ***(refd)***

Malayan Banking Bhd v. Red Box (M) Bhd [2000] 6 CLJ 21 ***(refd)***

Oh Hiam & Ors v. Tham Kong [1980] 2 MLJ 159 ***(dist)***

Ong Lian Shyang & Satu Lagi lwn. Hoover Mutiara Sdn Bhd & Satu Lagi (No 2) [2001] 1 CLJ 141 ***(refd)***

Perpetual Plantations of Australia Ltd v. United Tree Farmers Ltd [1992-1993] 10 ACSR 82 ***(foll)***
Perwira Affin Bank Bhd v. Tan Ah Tong [2001] 5 CLJ 28 ***(refd)***
Platinum Heights Sdn Bhd v. Sun Mix Concrete Sdn Bhd [1997] 1 MLJ 409 ***(refd)***
Re Sunshine Securities (Pte) Ltd; Sunshine Securities (Pte) Ltd & Anor v. Official Receiver and Liquidator of Mosbert Acceptance Ltd [1978] 1 MLJ 57 ***(refd)***
Salak Park Development Sdn Bhd v. Fajar Menyensing Sdn Bhd [1994] 4 CLJ 581 ***(dist)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 ***(refd)***
Sungei Rinching Sdn Bhd v. Sri Keluarga Sdn Bhd [1996] 3 CLJ 44 ***(refd)***
Suntoso Jacob v. Kong Miao Ming [1986] 2 MLJ 170 ***(refd)***
Teng Meow Chong v. Chia Ngim Fong & Anor [1991] 3 MLJ 452 ***(refd)***
Tham Kong v. Oh Hiam & Ors [1968] 1 MLJ 44 ***(refd)***
YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd [1996] 3 CLJ 51 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 221(1)
Rules of the High Court 1980, O. 27 rr. 1, 3

For the plaintiff - Lorraine Cheah (SS Soo); M/s Paul Ong & Assoc
For the defendant - Wong Kian Kheong (Cheah Soo Chuan); M/s Lee Hishammuddin

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing J:

Application

This is the plaintiff's application in encl. (4) seeking an interim injunction to restrain the defendant's winding-up petition against the plaintiff in Shah Alam High Court MT3-28-33-01 ("winding-up petition"), pending a full and mature determination of the plaintiff's action herein or any further order or direction of this court.

Background Facts

From the numerous affidavits filed by the respective parties herein, the background facts which are not substantially controverted have been carefully stated in the written submission for the defendant and may be reproduced as follows:

> The Defendant and its own wholly-owned subsidiary, Broadcast Communications Ltd. ("BCL"), have provided consultancy service to the Plaintiff to enable the Plaintiff to commence and to run a television broadcasting station ("Consultancy Service").

By agreement, the Plaintiff has agreed to pay to the Defendant for the Consultancy Service provided by both the Defendant and BCL to the Plaintiff.

The Plaintiff has admitted in writing on three (3) occasions the Plaintiff's indebtedness of a certain sum to the Defendant in respect of the Consultancy Service ("Due Sum").

The Defendant has previously issued a notice under section 218 of the Companies Act 1965 ("CA 1965") to the Plaintiff dated 17.7.1998 demanding payment of the Due Sum ("First Statutory Notice").

The Plaintiff then commenced an action against the Defendant in Kuching High Court Suit No. 22-179-98-II ("Kuching Suit") and obtained an *ex parte* injunction from the Kuching High Court on 21.8.1998 restraining the Defendant from proceeding with the First Statutory Notice ("Plaintiff's Kuching Injunction").

The Defendant applied successfully to strike out the Kuching Suit and the Plaintiff's Kuching Injunction with costs on 8.6.1999. The Plaintiff has not appealed to the Court of Appeal against the striking out of the Kuching Suit.

The Defendant then instituted an action against the Plaintiff in Shah Alam High Court No. 1 Civil Suit No. MT1-22-1238-1999 in respect of the Due Sum and has obtained default judgment against the Plaintiff on 24.10.2000 ("Default Judgment").

The Plaintiff has applied to set aside the Default Judgment in Shah Alam High Court No. 1 ("Plaintiff's Application to set aside Default Judgment"). The Plaintiff's Application to set aside the Default Judgment was scheduled to be heard by Shah Alam High Court No. 1 on 14.6.2001.

The Defendant has served a notice dated 11.12.2000 under section 218 CA 1965 to the Plaintiff demanding payment of the sum stated in the Default Judgment ("Second Statutory Notice").

Upon the Plaintiff's failure to pay the Defendant the sum as stated in the Second Statutory Notice, the Defendant has presented the Winding-up Petition which is scheduled to be heard by the Shah Alam High Court No. 3 on 17.8.2001.

Submission For Plaintiff

Cik Lorraine Cheah and Cik SS Soo, both learned counsel for the plaintiff, relied on *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293 and submitted that the burden on the plaintiff to succeed in the said application is, apart from the question of an undertaking as to damages and the balance of convenience, whether there are serious

issues to be tried. For this purpose, it was argued for the plaintiff that there are indeed serious questions to be tried, as the winding-up petition was used as an improper pressure on the plaintiff and based on a debt which was seriously disputed and cannot succeed. Support for this contention was sought in *Bina Satu Sdn Bhd v. Tan Construction (Sued As A Firm)* [1988] 2 CLJ 652; [1988] 1 CLJ (Rep) 384 and *Salak Park Development Sdn Bhd v. Fajar Menyensing Sdn Bhd* [1994] 4 CLJ 581.

It was also submitted that the defendant has failed to perform its obligations to the plaintiff under the consultancy agreement and has therefore caused the delay in the launching of NTV 7.

It was further argued for the plaintiff that the plaintiff's admission of the due sum was an admission made by mistake and sought to retract the admission by referring to *Gale v. Superdrug Stores Plc*. [1996] 1 WLR 1089. The plaintiff also alleged that the admission was due to the misrepresentation of the defendant that payments allegedly due to BCL were due to the defendant *via* the defendant's invoices and cited in support thereof *Hasham v. Zenab* [1960] 2 WLR 374 as adopted by the Federal Court in *Tham Kong v. Oh Hiam & Ors* [1968] 1 MLJ 44.

Relying on cl. 9.3 of the consultancy agreement, it was contended for the plaintiff that part-payments by the plaintiff shall not be taken as waiver of the plaintiff's grievances against the defendant and that the plaintiff was expressly entitled to withhold payments or make deductions in respect of any disputed claims.

Although plaintiff did not dispute that the winding-up petition was commenced by the defendant on the basis of the default judgment, it was argued that the plaintiff has applied to set it aside and the burden is not an onerous one ie, merely by showing defence on merits.

Learned counsel added that the justice of the case lies with the plaintiff as the winding-up petition would cause irreparable damage to the plaintiff as a national television station with nationwide coverage.

Plaintiff admitted that the plaintiff's Kuching suit has been struck out but argued that it was not decided on its merits and that the doctrine of *res judicata* does not apply.

Defendant's Contention

Encik Wong Kian Kheong and En. Cheah Soo Chuan, both learned counsel for the defendant, enumerated several issues which need to be resolved by the court in the disposal of the plaintiff's application in encl. (4). These issues relate to the grant or refusal of an injunction to restrain a winding-

up petition pending in another High Court, the binding effect of a default judgment, plaintiff's monetary claim, the application of the test of a *prima facie* case or a serious issue to be tried, whether that test has been fulfilled, whether damages would be an adequate remedy, the plaintiff's undertaking and finally the balance of convenience.

In particular, in response to the submissions for the plaintiff, defendant's learned counsel contended that the plaintiff's allegations cannot prevent the exercise of the defendant's statutory rights to proceed with the winding-up petition and that there is no *bona fide* and credible proof of the plaintiff's allegations. They added that the plaintiff is bound by the default judgment and admissions of indebtedness. They argued that cl. 9.3 of the consultancy agreement does not support the plaintiff's application and that the plaintiff could not rely on the doctrine of estoppel.

Decision Of The Court

After a very careful consideration of the comprehensive submissions advanced respectively for both the plaintiff and the defendant, it seems clear to me that the grant or refusal of the interim injunction is dependent upon the answers to be given to the points raised herein, including but not limited to the following questions:

1. In an application for an interim injunction to restrain a winding-up petition already pending in another High Court, what is the standard of proof or test required of the plaintiff, ie, to establish that it has a *prima facie* case against the defendant or merely that there is a serious issue to be tried? An inquiry into this question would determine the applicability or otherwise of the test expounded by the House of Lords in *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396 and accepted as the *locus classicus* on the subject by our Court of Appeal in *Keet Gerald Francis Noel John v. Mohd Noor @ Harun bin Abdullah & 2 Ors* [1995] 1 CLJ 293, (which apply to an injunction to restrain a defendant from doing acts alleged to be in violation of plaintiff's legal rights).

2. In any event, would damages be an adequate remedy?

3. Where does the balance of convenience lie?

I shall now proceed to examine and analyse each of the aforesaid questions and other points raised for the purpose of arriving at a proper exercise of discretion on the basis of established judicial principles and statutory provisions which are specifically applicable to all the relevant materials including the facts and circumstances and the submissions before me in the instant case.

Injunction To Restrain Pending Winding-up Petition

The first and foremost issue is whether the plaintiff may obtain an interim injunction from one High Court to restrain a winding-up petition already pending in another High Court. It is to be noted that avenue exists under s. 221(1) of the CA 1965 for the plaintiff to apply for a stay of the winding-up petition as the court may adjourn the hearing of the winding-up petition conditionally or unconditionally or make any interim or other order that it thinks fit. By way of illustration, in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299 CA, the appellants moved the court, *albeit* unsuccessfully, for a stay of all proceedings on the winding-up petition pending the hearing and disposal of their appeal.

Since the plaintiff herein did not seek to invoke s. 221(1) of the CA 1965 to stay the winding-up petition, I will dispense with the effort in considering s. 221(1), but proceed to consider encl. (4) herein for injunctive relief. In *Perpetual Plantations Of Australia Ltd v. United Tree Farmers Ltd* [1992-1993] 10 ACSR 82, the defendant (United) presented proceedings to wind-up the plaintiff (Perpetual). Perpetual applied for an injunction restraining United from, *inter alia*, continuing with the winding-up petition. One of the central issues there was whether the balance of a particular debt was presently due and payable. The grounds proffered by Burley, J in refusing the application for injunctive relief may be summarised as follows:

1. the dispute as to whether the sum was due and payable should be best resolved in the winding-up court;

2. the company may seek an injunction in the winding-up court instead of commencing separate proceedings to restrain winding-up proceedings; and

3. to allow an interim injunction in a court, other than the winding-up court, to restrain winding-up proceedings, would be "to encourage litigants to commence a multiplicity of proceedings where the same were not necessary."

Having had the opportunity of perusing the well-considered judgment of Burley, J, I am in entire agreement with the reasoning expounded therein. In addition, I would observe that *Perpetual Plantations Of Australia Ltd v. United Tree Farmers Ltd, supra,* is in consonance with our s. 221(1), *supra,* which confers jurisdiction on the winding-up court to stay winding-up proceedings and so the most appropriate forum to decide whether or not winding-up proceedings should continue should be the winding-up court. Besides, policy considerations, aimed at preventing multiplicity of proceedings, support the rule that pending winding-up proceedings should

only be continued or restrained by the winding-up court. Further it is undesirable, and indeed incongruous for one High Court to grant an interim injunction to restrain a winding-up petition already pending before another High Court of concurrent jurisdiction. Indeed, it is axiomatic that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction: *Perwira Affin Bank Bhd v. Tan Ah Tong* [2001] 5 CLJ 28.

In the circumstances, I adopt and follow the decision in *Perpetual Plantations Of Australia Ltd v. United Tree Farmers Ltd, supra.*

I am of the view that plaintiff's application in encl. (4) constitutes an abuse of process of the court. As stated above, the plaintiff is not without any effective remedy as the plaintiff is at liberty at all times to apply to the winding-up court to stay the winding-up petition.

Default Judgment Is Binding

The plaintiff herein cannot by way of the present proceedings challenge the validity of the due sum in view of the default judgment. I am of the opinion that the plaintiff is bound by the default judgment which is a valid and regular judgment unless and until it is set aside. The application to set aside should be made to the court in which the default judgment was entered. All views relating thereto must be ventilated there and not in this court by way of a separate and distinct proceeding.

Since the plaintiff is bound by the default judgment, the defendant is entitled to proceed with the winding-up petition based on the default judgment. *YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Sdn Bhd (Formerly Known As Matang Factoring Sdn Bhd)* [1996] 3 CLJ 51 CA; *Bank Pembangunan (M) Bhd v. Elgi Marka Sdn Bhd* [1998] 5 MLJ 504. In *Sungei Rinching Sdn Bhd v. Sri Keluarga Sdn Bhd* [1996] 3 CLJ 44 CA, a similar position prevails in respect of a summary judgment.

Monetary Claim

Since paras. 3 to 20 of the statement of claim in encl. (2) set out the plaintiff's claim for damages which are purely monetary in nature, there is in my view nothing to be preserved by the grant of an interim injunction in this case. Paragraph 21 *ibid* refers to the need to restrain the defendant from further proceeding with the winding-up petition against the plaintiff.

The statement of claim did not specifically pray for the remedy of an injunction in para. 22(a) to (f).

The plaintiff relied heavily on the consultancy agreement, exh. A4, pp. 7-20 of the defendant's affidavit in encl. (7). Clause 10 at p. 11 of exh. A4 thereof expressly provides for the limit of the monetary claim and reads as follows:

> The liability of each party hereto to the other for all loss, damage, costs, legal costs and professional and other expenses of any nature whatsoever incurred or suffered by one party hereto shall not exceed the sum of US Dollars one million ($US1,000,000.00).

In the circumstances, there is as alluded to above nothing to preserve pending the trial of the plaintiff's monetary claim. The plaintiff may pursue the plaintiff's claim but to apply for an interlocutory injunction to restrain the winding-up petition pending before the winding-up court, constitutes an abuse of process of the court.

***Prima Facie* Case Or Serious Issue To Be Tried**

In order to succeed in an application for injunctive relief to restrain the defendant from proceeding with the winding-up petition, I am of the view that the standard of proof or test required of the plaintiff is to establish a *prima facie* case and not merely a serious question to be tried. I am fortified in this view by a number of authorities. In *Bryanston Finance Ltd v. De Vries (No 2)* [1976] 1 All ER 25 CA, the defendant held 62 shares in a company whose issued capital was more than seven million shares. The company applied for an injunction restraining the defendant from presenting a winding-up petition. The judge of the first instance held that he should decide whether to grant the injunction on the balance of convenience, obviously relying on the test applied by the House of Lords in *American Cyanamid Co v. Ethicon Ltd* [1975] 1 All ER 504 and then granted the injunction. On appeal, the Court of Appeal held, *inter alia*, that the plaintiff company was only entitled to interlocutory relief to prevent anticipated litigation if on the available evidence it could be said that presentation of a petition would *prima facie* be an abuse of process. In other words, the court should not interfere with what would otherwise be a legitimate petition unless there were sufficient *prima facie* evidence. The *American Cyanamid* test did not find favour with the Court of Appeal in *Bryanston Finance Ltd v. De Vries (No 2)*, *supra*. Buckley, LJ at p. 36, d to e said:

> The right to petition the court for a winding-up order in appropriate circumstances is a right conferred by statute. A would-be petitioner should not be restrained from exercising it except on clear and persuasive grounds ...

> In his speech in the *American Cyanamid* case Lord Diplock recognised that there might be special factors to be taken into consideration in the particular circumstances of individual cases. "In my judgment, the fact that the second action is an action designed to prevent the commencement of proceedings in limine is such a special factor. In such a case the court should not, in my judgment, interfere with what would otherwise be a legitimate approach to the seat of justice unless the evidence is sufficient to establish *prima facie* that the plaintiff will succeed in establishing that the proceedings sought to be restrained will constitute an abuse of process. In the present case, in my opinion, this has not been achieved. I would consequently allow the appeal in the second action and discharge the injunction of 15th May.

Stephenson, LJ in agreeing with Buckley LJ's judgment added:

> This is not 'an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right', but to restrain a defendant from exercising his legal right to present a petition. So Lord Diplock's words in the *American Cyanamid* case which Buckley LJ has quoted do not apply to such an application as this.

Sir John Pennycuick, the third judge, also agreed with the reasons given by Buckley, LJ and obseved that the *American Cyanamid* case, *supra*, cannot be regarded as applicable to an application for an injunction restraining the presentation of winding-up petition on the ground that the presentation of petition there would be an abuse of the process of the court.

The above English Court of Appeal decision in *Bryanston Finance Ltd v. De Vries (No 2)*, *supra*, was followed by the New Zealand Court of Appeal in *Anglian Sales Ltd v. South Pacific Manufacturing Co Ltd* [1984] 2 NZLR 249 at p. 250 lines 10-25 and within our shores by Abdul Malik Ishak, J in *Malayan Banking Bhd v. Red Box (M) Bhd* [2000] 6 CLJ 21, where *vide* encl. (14), the respondent therein sought an order that Malayan Banking Bhd be restrained from taking any further proceedings on the winding-up petition whether by advertising the same or otherwise. The learned judge held, *inter alia*, at p. 31 c to d as follows:

> By virtue of *Bryanston Finance Ltd (supra)* and *Anglian Sales Ltd (supra)*, the burden was on the respondent to establish a *prima facie* case to support the notice of motion in encl. 14. The onus on the respondent was not merely to raise a serious question to be tried as envisaged by Lord Diplock in the *American Cyanamid* [1975] AC 396 but the respondent has the added responsibility by way of a higher standard of proof to convince me in regard to the notice of motion in encl. 14 (*Bryanston Finance Ltd (supra)* and *Anglian Sales Ltd (supra)*).

I agree with the reasons given by the English and New Zealand Court of Appeal respectively and by Abdul Malik Ishak, J and hold that for the purpose of obtaining an interim injunction to restrain the defendant from proceeding with the winding-up petition, the burden of proof cast on the plaintiff is only discharged by reference to the standard of proof or test in adducing evidence to establish a *prima facie* case and that the principle relating to the test of "serious question to be tried" in *American Cyanamid, supra,* as applied in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah* [1995] 1 CLJ 293 is not applicable as the applications there were no applications to restrain winding-up petitions or proceedings, such as in the instant case before me.

Has The *Prima Facie* Test Been Fulfilled

Now, has the plaintiff succeeded in establishing a *prima facie* case against the defendant. It is to be observed that the undisputed facts demonstrated that the plaintiff has made three admissions of owing the due sum to the plaintiff and more significantly the default judgment entered against the plaintiff. The plaintiff's three admissions of indebtedness are manifested in the plaintiff's three facsimiles from one Puan Melini Ismail, the plaintiff's then corporate director, one on 20 February 1998, and two on 16 May 1998, all of which admissions have not been contemporaneously withdrawn.

In *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5, the facts showed that the respondent company in its affidavit in support of its application for injunction has admitted that it owed the appellant a sum of RM60,580 and stated that it was at all times ready to pay this sum. The High Court granted an injunction restraining the appellant from advertising the petition. On appeal, the Supreme Court allowed the appeal and the injunction was set aside.

The Singapore Court of Appeal in *Re Sunshine Securities (Pte) Ltd; Sunshine Securities (Pte) Ltd & Anor v. Official Receiver And Liquidator Of Mosbert Acceptance Ltd* [1978] 1 MLJ 57 held that the clear and unequivocal admission of debt would entitle the judge to conclude that there was no *bona fide* dispute.

In *Malayan Banking Bhd v. Red Box (M) Bhd, supra,* the High Court dismissed an application by a company to restrain winding-up proceedings on, among others, the ground that there had been admission of the company's indebtedness.

Similarly, in *Platinum Heights Sdn Bhd v. Sun Mix Concrete Sdn Bhd* [1997] 1 MLJ 409, at 412B-C and 416C-D the High Court dismissed an originating summons seeking an injunction to restrain winding-up proceedings against the plaintiff as the plaintiff had admitted its indebtedness to the defendant.

Again in *Hixgold Pty Ltd v. FCT* [1992] 8 ACSR 607, the Queensland Supreme Court dismissed an application to restrain winding-up proceedings on the ground that the plaintiff had acknowledged its indebtedness and the plaintiff's failure to pay what was admittedly due, was sufficient to indicate that the plaintiff was unable to meet the claims of its creditors.

It is therefore clear from the above plethora of cases that the plaintiff's admissions of indebtedness which had not been contemporaneously withdrawn have amply demonstrated that the plaintiff is not likely to establish any *prima facie* case against the defendant and that there can be no *bona fide* dispute on the due sum.

Bina Satu Sdn Bhd v. Tan Construction (sued as a firm), supra, and *Salak Park Development Sdn Bhd v. Fajar Menyensing Sdn Bhd, supra,* relied on by the plaintiff may be distinguished as there were *bona fide* disputes on the alleged debts and so the facts are different from those in the instant case.

Further, I am of the view that the plaintiff is estopped from denying its own admissions of indebtedness: *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283 and *Bukit Melita Sdn Bhd v. Lam Geok Hee & 7 Ors* [1997] 4 AMR 3160.

It is exceedingly difficult for me to accept the alleged mistake in the plaintiff's aforesaid admissions as there is no contemporaneous documentary evidence except a bare assertion, to establish this mistake. It is, with due respect, in all probabilities an afterthought, in the light of the defendant having obtained the default judgment and after the defendant has presented the winding-up petition. Hence, I hold that this plea of mistake cannot succeed.

Gale v. Superdrug Stores Plc, supra, on which the plaintiff sought reliance, concerned an admission of the plaintiff's claim for damages for personal injuries by the defendant's insurers and the defendant's insurers then followed up by an interim payment on account of damages. As such, there was an admission of liability within the meaning of O. 27 r. 1 of the Rules of the High Court 1980 ("RHC"). The plaintiff then applied to strike out the defence based on the admission by the defendant's insurers pursuant to O. 27 r. 3 RHC. The issue was whether the court should allow the withdrawal of the insurer's admission; and the Court of Appeal gave the answer in the affirmative.

In the instant case, as alluded to above, the plaintiff itself through its own director, one Puan Melini Ismail, made three admissions of indebtedness to the defendant. Clearly, the facts of this case are very different from those in *Gale v. Superdrug Stores Plc*.

The Federal Court decision in *Tham Kong v. Oh Hiam & Ors* [1968] 1 MLJ 44 which was relied on by the plaintiff has been reversed by the Privy Council on appeal in *Oh Hiam & Ors v. Tham Kong* [1980] 2 MLJ 159, at 159C-F (left) and 165D-E (left). It is clear from the judgment of the Privy Council that there was evidence of common mistake in that case. However, in the instant case, there is no evidence of any common mistake.

Damages An Adequate Remedy

In my view, damages would be an adequate remedy, especially in the light of my finding that the plaintiff's claim is of a purely monetary nature.

The Supreme Court in *Associated Tractors Sdn Bhd v. Chan Boon Heng & Anor* [1990] 2 CLJ 157, at 157A-B (right) set aside an injunction to restrain the plaintiff from taking possession of the machinery for which the defendants sought the return of RM90,000 as the sum allegedly paid towards the purchase of the machinery. In *Ong Lian Shyang & Satu Lagi lwn. Hoover Mutiara Sdn Bhd & Satu Lagi (No 2)* [2001] 1 CLJ 141, at 163A-F, Ramly Ali, JC took a similar stand where damages would be an adequate remedy.

Plaintiff's Undertaking

On the affidavits, it seems clear to me that the plaintiff's undertaking is doubtful if not worthless because the plaintiff's financial ability to honour the undertaking is significantly undermined by the plaintiff's failure to pay in accordance with first and second proposed payment schedules which were mooted by the plaintiff itself and the due sum is still outstanding in the face the plaintiff's first admission of indebtedness dated 20 February 1998. In addition, the plaintiff has yet to satisfy the costs of the Kuching suit.

Further, despite the defendant's request for the plaintiff to fortify the plaintiff's undertaking, the plaintiff has to date failed to do so. In *Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors* [1989] 1 MLJ 426, the first plaintiff to whom an injunction was granted was unable to respond to the challenge to produce evidence of means in support of his undertaking as to damages, as a result of which the undertaking was held to be barren and the injunction was set aside. Similarly, in *Ong Lian Shyang & Satu Lagi lwn. Hoover Mutiara Sdn Bhd & Satu Lagi (No 2), supra,* in the absence of the ability to fulfil an undertaking as to damages, an application for injunction was dismissed.

A judge hearing an application for injunction is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee: per Gopal Sri Ram, JCA in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors, supra*. Hence, where the plaintiff was incapable of executing the undertaking as to damages when the time came, the Court of Appeal held that injunction should not be granted: *Gerak Indera Sdn Bhd lwn. Farlim Properties Sdn Bhd; Goh Keat Poh (Wasi Dan Pemegang Amanah Harta Pusaka Chor Sin Khen, Si Mati) & Lain-Lain lwn. Farlim Properties Sdn Bhd* [1997] 3 MLJ 90.

Balance Of Convenience

I am of the view that the balance of convenience or justice is not in favour of granting the injunction, as there is no evidence of any irreparable harm suffered by the plaintiff whose business activities including television broadcasts have continued and will continue as usual. There is no evidence of any apparent prejudice or damage occasioned to the plaintiff. In any event, as the defendant is a company owned by the New Zealand Government, I hold that it is in a position to pay damages, if any, to the plaintiff.

Plaintiff's Conduct

The plaintiff's conduct as disclosed in the plaintiff's affidavit in support of the application to obtain the injunction would call for some observation. The plaintiff's said affidavit clearly did not disclose the plaintiff's three admissions of indebtedness, the striking out of the plaintiff's Kuching suit and the absence of appeal therefrom. These are some of the material facts which the plaintiff is obliged to disclose in the plaintiff's affidavit in support as the plaintiff is seeking an equitable remedy and as such the plaintiff's conduct must also be equitable as he who seeks equity must do equity, in line with one of the maxims of equity ie, he who comes into equity must come with clean hands: *Suntoso Jacob v. Kong Miao Ming* [1986] 2 MLJ 170, 175d left, as followed in *Teng Meow Chong v. Chia Ngim Fong & Anor* [1991] 3 MLJ 452, 4551 (left). In my view, the plaintiff's conduct in relation to the non-disclosure of the aforesaid material facts has adversely affected or indeed negatived the plaintiff's application for injunctive relief.

Conclusion

On the basis of the reasons given above, I hold that the plaintiff's application in encl. (4) for injunctive relief fails. I therefore dismiss it with costs.